BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GLENN D. FARRELL, JR. Claimant	)	
VS.	)	Docket No. 1,037,447
TAP ENTERPRISES, INC., d/b/a **CUMMINS INDUSTRIAL TOOLS** Self-Insured Respondent	)	

ORDER

STATEMENT OF THE CASE

Respondent requested review of the February 4, 2009, Award entered by Administrative Law Judge Marcia L. Yates Roberts. The Board heard oral argument on May 20, 2009. Rian F. Ankerholz, of Overland Park, Kansas, appeared for claimant. Kevin J. Kruse, of Overland Park, Kansas, appeared for the self-insured respondent.

The Administrative Law Judge (ALJ) found that claimant suffered a compensable injury, that written claim was timely, and that claimant sustained a 10 percent permanent partial impairment to his right upper extremity at the level of the shoulder. The ALJ further found that claimant was entitled to medical care for his work injury but that medical treatment was denied by respondent and, accordingly, ordered respondent to pay his medical mileage and the medical bills as set out in Exhibit 3.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Respondent argues that claimant failed to give adequate notice of his injury, noting that the ALJ failed to address this issue in the Award. Further, respondent contends that claimant is not entitled to compensation because his injury did not arise out of and in the course of his employment with respondent. If the Board finds this claim is compensable, respondent requests the Board affirm the ALJ's finding that claimant had a 10 percent permanent partial impairment to his right upper extremity, but also requests the Board find that claimant had a 5 percent preexisting impairment and, therefore, is only entitled to a

5 percent disability rating for his alleged injury in this incident. Next, respondent contends that claimant should not be reimbursed for medical treatment or medical mileage because his surgery was unauthorized and was completed before receipt of the ALJ's preliminary hearing order that denied claimant's request to have the treatment paid by respondent. Respondent further argues that it neither refused nor neglected to provide claimant with medical treatment.

Claimant asserts that he met with accidental injury that arose out of and in the course of his employment, that he provided respondent with sufficient notice of his injury, that he is entitled to payment of medical expenses and medical mileage, and that the ALJ's finding that claimant had a 10 percent permanent partial impairment to the right shoulder is supported by the evidence in the record. Accordingly, claimant requests that the ALJ's Award be affirmed.

The issues for the Board's review are:

(1) Did claimant suffer personal injury by accident that arose out of and in the course of his employment with respondent?

(2) If so, did claimant provide respondent with timely notice of his accident?

(3) What is the nature and extent of claimant's disability?

(4) Is respondent entitled to a credit for claimant's preexisting impairment?

(5) Is claimant entitled to payment of his medical bills and medical mileage as authorized medical expenses?

FINDINGS OF FACT

Claimant worked for respondent as a load driver transporting tools. Although he was a no-touch load driver, at times he volunteered to help unload. Usually when claimant helped unload, it was when he had to get to another drop and the unloading went faster when he helped. On August 31, 2007, claimant was helping unload tools in Pearson, Georgia. The tools he was unloading weighed anywhere from 5 pounds to 300 pounds. In order to unload the pallets, he had to reach above his head, and "I guess while I was unloading it is when I tore my shoulder."[1] Claimant did not realize he sustained an injury that day. He continued taking loads to Claxton, Georgia, and Gordon, Georgia, but does not remember if he did any unloading at either stop. He continued performing his normal job duties up until his last day of work, which was on or about October 8, 2007, except he did not unload any trailers after August 31, 2007.

[1] P.H. Trans. at 7.

Claimant had shoulder complaints before August 31, 2007. He said he had a history of arthritis in both shoulders for 7 to 10 years, for which he was taking Relafen, an anti-inflammatory medication. His arthritis, however, did not affect his ability to work. He testified that about a month before August 31, 2007, his shoulder complaints began to increase. On August 27, 2007, he visited his personal physician, Dr. Douglas Anderson, to have a prescription medication renewed. While there, he complained about the worsening pain in his shoulders. Dr. Anderson testified that he examined claimant's shoulders and found nothing unusual. Dr. Anderson changed claimant's medication from Relafen to Naprosyn.

Claimant testified that on September 1, 2007, the day after he unloaded tools in Pearson, Georgia, he felt pain in both his shoulders, which he attributed to his work activities the day before. Although the pain in his left shoulder subsided, the pain in his right shoulder continued and worsened. About 10 days to 2 weeks later, the pain had worsened to the point where he called his wife and asked her to make an appointment with Dr. Anderson. He testified that at that point, he knew his problems were the result of his work on August 31, 2007.

Claimant was seen by Dr. Anderson on September 28, 2007, at which time he was complaining of worsening right shoulder pain and new onset of abdominal pain.[2] Upon examination, Dr. Anderson found that claimant had tenderness in the right shoulder to abduction and external rotation. Dr. Anderson believed that claimant had a right rotator cuff injury and recommended that he see an orthopedist. Because claimant had told him he was doing more physical labor in his job with respondent than in his past job and because claimant's right shoulder pain occurred while he was working, Dr. Anderson suggested to claimant that if he thought his condition was work related, he would need to be sure he went through the proper channels to get treatment.

Claimant reported his injury to respondent on October 2, 2007. At that time, he spoke with a person from the human resources department named Tiffany. Tiffany told claimant that he was late in reporting his injury and that he was required to report a work-related injury within 72 hours. Claimant testified that Tiffany would not accept the accident report from him and asked him to get some paperwork from Dr. Anderson. She did not offer to send him to a doctor or to pay for any medical treatment. Likewise, claimant did not specifically request that respondent pay for medical treatment. Claimant said he contacted Dr. Anderson's office and requested that the paperwork be sent to respondent.

Claimant admitted that he had the capability of talking to the dispatcher at any time when he was working and could have reported an accident at any time. He also testified that he knew by September 1 that he had pain in both shoulders caused by his work

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[2] Although Dr. Anderson suggested that claimant might have an umbilical hernia, claimant testified that he is no longer having pain in his abdomen and is not asking for treatment for a hernia in this case.

activities the day before. When his left shoulder pain subsided and his right shoulder pain worsened causing him to seek medical attention 10 days to 2 weeks later, he also attributed this to his work activities of August 31. Nevertheless, he did not report his injury to respondent until October 2, 2007, five days after his visit to Dr. Anderson. He testified that he did not report his problem to respondent as a work injury earlier because he thought it was his arthritis giving him problems and because he wanted to see a doctor first.

On or about October 24, 2007, claimant was seen by an orthopedic surgeon, Dr. Thomas Rasmussen. Dr. Rasmussen ordered an MRI to be performed, which was done on October 29, 2007. That MRI showed that claimant had a right rotator cuff tear. On February 21, 2008, a preliminary hearing was held in which claimant requested treatment of his torn rotator cuff. After taking testimony, the ALJ continued the matter for 10 days in order to get a report from Dr. Rasmussen. Dr. Rasmussen's records were filed with the Division on February 29, 2008, and on March 4, 2008, the ALJ asked the parties to submit further recommendations within 10 days. Claimant's attorney requested that Dr. Rasmussen be authorized as claimant's treating physician. Respondent filed a brief on March 14 requesting that claimant's request for compensation be denied.

On April 17, 2008, before the ALJ issued an order on claimant's request for treatment, Dr. Rasmussen performed surgery on claimant's right shoulder, repairing his rotator cuff tear. On April 25, 2008, the ALJ issued a Preliminary Decision in which he said he had not received any further input from the parties and so ordered shoulder surgery to be paid for by respondent. In a letter dated May 2, 2008, respondent's attorney referred the ALJ to his brief. The ALJ, on May 5, 2008, suspended the case until he heard from claimant's attorney, and also suspended the order approving the surgery. Claimant filed a brief concerning the issues raised in the preliminary hearing on May 21, 2008. On May 28, 2008, the ALJ issued a second Preliminary Decision in which he stated: "It is considered that adequate proof of [an] event August 31st or September 1st actually produced a compensable injury is not present yet so the treatment sought is denied at this time, contrary to the order issued April 25th."[3]

When asked why he scheduled surgery with Dr. Rasmussen before receiving the ALJ's Order from the preliminary hearing, claimant stated: "I was under the impression from the Judge if he said, Dr. Rasmussen said go, go, so I went."[4] He admitted that no one from respondent authorized his treatment with Dr. Rasmussen and that he expected his medical bills to be paid by his personal health insurance.

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[3] ALJ Preliminary Decision dated May 28, 2008, at 2.

[4] R.H. Trans. at 52.

Dr. Daniel Zimmerman is a board certified independent medical examiner and is also board certified in internal medicine. He examined claimant on August 28, 2008, at the request of claimant's attorney. Claimant gave him a history of injuring his right shoulder on August 31, 2007, while unloading tools. In doing this activity, he developed pain in his right shoulder to a greater extent than his left shoulder.

Upon examination, Dr. Zimmerman found that claimant had a loss of range of motion in his right shoulder. Claimant had surgery on his right shoulder to repair a torn shoulder rotator cuff before being seen by Dr. Zimmerman. Dr. Zimmerman opined that claimant had permanent aggravation of osteoarthritis affecting the acromioclavicular joint and rotator cuff tear that was causally related to his accident of August 31, 2007. Dr. Zimmerman said that it was unlikely that claimant would have no signs of a rotator cuff injury on August 27, 2007, and signs of it on September 28, 2007, without some type of traumatic event having occurred.

Claimant was released from treatment on August 6, 2008. He advised Dr. Zimmerman that his shoulder was much better post surgery. He said he felt he had a little weakness and some aching with weather changes. He was able to sleep on his right shoulder. He had no numbness or tinging in the right upper extremity, and he felt he had good range of motion of his right shoulder. He could reach behind his back, but it was not an easy thing to do. Dr. Zimmerman tested claimant's range of motion in his left and right shoulder, and neither was normal.

Using the AMA *Guides*,[5] Dr. Zimmerman rated claimant as having an 18 percent permanent partial impairment to his right upper extremity at the shoulder level. Dr. Zimmerman gave claimant a 10 percent rating based on his shoulder surgery. To that, he added an impairment for range of motion restrictions. He rated claimant as having a 2% for loss of range of motion with forward flexion, 1% for loss of range of motion in extension, 1% for loss of range of motion with adduction, 4% for loss of range of motion with internal rotation, and 1% for loss of range of motion with external rotation, for the additional 8%. Dr. Zimmerman agreed that if at some point claimant had normal range of motion in all those planes, he would then only get a 10 percent rating because of the procedure.

Dr. Zimmerman did not apportion any of the rating for a preexisting arthritic condition in his shoulder, saying the rating was all due to the trauma sustained in his employment on August 31, 2007. He indicated that in his opinion, claimant's previous right shoulder condition did not satisfy him as being a chronic condition. He admitted that if claimant had six months of complaints or treatment to either his right or left shoulder before August 31, 2007, he would have considered that a preexisting condition and possibly apportioned his

[5] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

rating. He was not aware that claimant had bilateral shoulder complaints for 7 to 10 years before the alleged accident of August 31, 2007, or that claimant's bilateral shoulder complaints suddenly worsened a month prior to August 31. He did not know that claimant's medication had been changed four days prior to the August 31 incident because of a worsening of his bilateral shoulder complaints.

Dr. Zimmerman said claimant was capable of lifting 50 pounds on an occasional basis and 25 pounds on a frequent basis below waist height. If he tries to use the right upper extremity to lift weights above his head, he should lift no more than 20 pounds on an occasional basis and 10 pounds on a frequent basis. He should avoid work activity at shoulder height or above on the right. When Dr. Zimmerman saw claimant, he was only four and a half months post surgery. He said that claimant could potentially continue to improve his strength up to at least a year post-surgery.

Dr. Chris Fevurly is board certified in internal medicine and in preventive medicine with a specialization in occupational medicine. He is also a board certified independent medical examiner. He examined claimant on two occasions, both at the request of respondent. The first was on February 8, 2008, before the February 21 preliminary hearing.

Dr. Fevurly noted that claimant had seen Dr. Anderson on August 27, 2007, complaining of worsening of his shoulder complaints that had been going on for approximately a month. He said that shoulder pain, arthritis, and degenerative rotator cuff changes hurt and get worse and better depending on different factors and that one of those factors was every day wear and tear based on normal activities.

Dr. Fevurly's assessment of claimant's condition in February 2008 was that claimant had a right shoulder rotator cuff tear which was preceded by a 5 to 10 year history of bilateral shoulder aches and a 5 to 10 year history of use of pain medicines and anti-inflammatory drugs for shoulder pain. He opined that the prevailing cause for claimant's rotator cuff injury was degenerative in nature and preexisted August 31, 2007. He stated that claimant's medical history was not good for a significant and clinical change in his history from the events of August 31, 2007. Dr. Fevurly supported his opinion by stating:

> Well, you know, we know from scientific studies that rotator cuff thinning occurs over time. This is usually caused by changes in the bony anatomy and the soft tissue anatomy of the shoulder. There is impingement on the rotator cuff with a wearing that occurs from the bony hypertrophy or enlarging that occurs over time from the degenerative process leading to wearing of the rotator cuff. And when we do MRIs even on symptom free people over the age of 40, partial thickness rotator cuff tears are present in about 30 to 40 percent of those. Now, full thickness tears can be seen that are asymptomatic, but in general when we get the full thickness

> tears they become more symptomatic. But many, many people in their 60s have full thickness tears and have little or no symptoms.[6]

Dr. Fevurly saw claimant again on October 15, 2008. Since his last examination, claimant had decompression surgery with rotator cuff repair and an acromioplasty on April 17, 2008. Claimant had done well with the surgery and had attended physical therapy. He had been released from treatment in early August 2008. Claimant told him he had a tremendous improvement in his active range of motion. He still had some right shoulder aches but it was much improved. He had persistent discomfort with repetitive tasks. He had occasional pain in the right shoulder with overhead reaching or pulling forward reaching with the right arm. Dr. Fevurly said that generally, it takes about 12 months to completely recover from a rotator cuff repair. If he saw claimant 12 months after the surgery, he would expect his improvements to be even greater than when he saw him 6 months after the surgery.

Dr. Fevurly's assessment was that claimant had a right shoulder rotator cuff tear with a good surgical result and dramatic improvement in his range of motion. Based on the AMA *Guides*, he rated claimant as having a 10 percent permanent partial impairment of the right upper extremity for his surgical acromioplasty and for crepitation. Dr. Fevurly opined that half of claimant's impairment, or 5 percent, would have been preexisting.

Dr. Fevurly's opinion regarding causation remained the same as after his February 2008 examination, that the probable cause of claimant's rotator cuff tear is the natural degenerative process. However, he could not rule in or out any single event being the exact moment when the tear occurred.

PRINCIPLES OF LAW

K.S.A. 2008 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2008 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[7]

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[6] Fevurly Depo. at 11-12.

[7] K.S.A. 2008 Supp. 44-501(a).

Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[8]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[9]

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[10] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[11] An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.[12]

The Workers Compensation Act provides that compensation awards should be reduced by the amount of preexisting functional impairment when the later injury is an aggravation of a preexisting condition. The Act reads, in part:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.[13]

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[8] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[9] *Id.* at 278.

[10] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

[11] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

[12] *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

[13] K.S.A. 2008 Supp. 44-501(c).

The Board interprets the above statute to require that a ratable functional impairment must preexist the work-related accident. The statute does not require that the functional impairment was actually rated or that the individual was given formal medical restrictions. But it is critical that the preexisting condition actually constituted an impairment in that it somehow limited the individual's abilities or activities. An unknown, asymptomatic condition that is neither disabling nor ratable under the AMA *Guides* cannot serve as a basis to reduce an award under the above statute.

A physician may appropriately assign a functional impairment rating for a preexisting condition that had not been rated. Generally, the physician must use the claimant's contemporaneous medical records regarding the prior condition. The medical condition diagnosed in those records and the evidence of the claimant's subsequent activities and treatment must then be the basis of the impairment rating using the appropriate edition of the AMA *Guides*.

K.S.A. 44-520 states:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

ANALYSIS

On August 31, 2007, claimant injured his right shoulder while unloading his truck. Although claimant had experienced prior symptoms in his shoulder, those symptoms were due to arthritis and did not prevent claimant from working. The new injury was a tear to the rotator cuff. Claimant was not required to assist with unloading, but he was not prohibited from doing so. By helping to unload, claimant was able to get to his next stop sooner. This benefitted claimant's employer. Claimant suffered personal injury by accident arising out of and in the course of his employment with respondent on August 31, 2007.

Claimant reported his injury to Tiffany in respondent's Human Resources Department on October 2, 2007. This was more than 10 days after the accident. The

Board finds, however, that claimant had just cause for his failure to report his accident within 10 days and, therefore, his time for reporting his accident is extended to 75 days. Claimant did report his accident within 75 days; therefore, notice was timely. Claimant had experienced shoulder pain before and thought he could work through it. The pain in his left shoulder improved, but the right shoulder did not improve. In fact, it got worse. After the pain was so bad that he sought medical treatment, claimant learned of his rotator cuff injury from Dr. Anderson. It was then that claimant understood he had a new injury that would not improve without treatment and that the condition was work related. He reported his accident shortly thereafter.

Claimant has a 10 percent permanent impairment of function of the right shoulder. Five percent of that, however, preexisted the accident of August 31, 2007. Therefore, claimant is entitled to an award of permanent partial disability compensation for a 5 percent loss of use of the right upper extremity at the level of the shoulder.

Respondent is required to pay compensation when a worker is injured by an accident arising out of and in the course of employment even if the injury is an aggravation of a preexisting condition. When claimant reported his accident and injury to respondent, he was refused medical treatment.[14] Claimant sought medical treatment on his own. Respondent is liable for the reasonable and related medical treatment obtained by claimant, including the cost of his right shoulder surgery. Under the facts of this case, when treatment had been refused, it is irrelevant whether claimant proceeded to a preliminary hearing to obtain approval of his treatment and it is irrelevant whether the ALJ had decided the preliminary hearing request before the necessary treatment was obtained.

CONCLUSION

(1) Claimant suffered personal injury to his shoulder by accident on August 31, 2007, that arose out of and in the course of his employment with respondent.

(2) Claimant provided respondent with timely notice of his accident.

(3)(4) Claimant has a 5 percent permanent impairment of function to his right upper extremity at the level of the shoulder as a result of the work-related accident. This represents a 10 percent total impairment less the 5 percent preexisting impairment.

(5) Claimant is entitled to payment by respondent of his reasonable and related medical expenses, including mileage, as authorized medical.

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[14] Claimant also requested medical treatment through his attorney. See Demand letters of November 8, 2007, and January 9, 2008.

The Board notes that the ALJ did not award claimant's counsel a fee for his services. The record does not contain a fee agreement between claimant and his attorney. K.S.A. 44-536(b) requires that the Director review such fee agreements and approve such contract and fees in accordance with that statute. As set out in the award, should claimant's counsel desire a fee be approved in this matter, he must submit his contract with claimant to the ALJ for approval.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Marcia L. Yates Roberts dated February 4, 2009, is modified to show that claimant has a 5 percent permanent partial disability to his right upper extremity at the level of the shoulder.

Claimant is entitled 11.25 weeks of permanent partial disability compensation, at the rate of $510.00 per week, in the amount of $5,737.50 for a 5 percent loss of use of the shoulder, making a total award of $5,737.50.

IT IS SO ORDERED.

Dated this _____ day of June, 2009.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Rian F. Ankerholz, Attorney for Claimant
Kevin J. Kruse, Attorney for the Self-Insured Respondent
Marcia L. Yates Roberts, Administrative Law Judge